89-2001

No.——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 22, 1990

QUESTION PRESENTED

Whether the court below erroneously construed Section 4 of the Natural Gas Act to restrict unjustifiably the statutory ratemaking powers of the Federal Energy Regulatory Commission, thereby precluding the Commission from effecting what the court itself acknowledged was an apparently equitable distribution among the customers of regulated natural gas pipelines of certain gas supply costs that arose during a period when the Commission, for administrative reasons, imposed a moratorium on the statutorily authorized recovery of such costs.

LIST OF PARTIES

The parties before the U.S. Court of Appeals for the District of Columbia Circuit were:

Petitioners

Columbia Gas Transmission Corporation
Michigan Consolidated Gas Company
Municipal Defense Group
Philadelphia Electric Company
Philadelphia Gas Works

Respondent

Federal Energy Regulatory Commission

Intervenors (Supporting Petitioners)

Process Gas Consumers Group
UGI Corporation

Intervenors (Supporting Respondent)

Panhandle Eastern Pipe Line Company
Trunkline Gas Company
Texas Gas Transmission Corporation
Transcontinental Gas Pipe Line Corporation

Other Intervenors

Atlanta Gas Light Company
CNG Transmission Corporation
General Service Customer Group and
Panhandle Customer Group
Indiana Gas Company, Inc.
Kansas Power & Light Company
Public Service Electric and Gas Company
Washington Gas Light Company

Panhandle was the petitioner and FERC the respondent in No. 89-1186, which was consolidated with Nos. 88-1701, 88-1808, 88-1825, 89-1052, 89-1086, 89-1140 and 89-1200.

In this instant proceeding, the Petitioners are Panhandle Eastern Pipe Line Company, Trunkline Gas Company, Texas Gas Transmission Corporation and Transcontinental Gas Pipe Line Corporation.

Trunkline Gas Company is a wholly-owned subsidiary of Panhandle Eastern Pipe Line Company. Panhandle Eastern Pipe Line Company is a wholly-owned subsidiary of Panhandle Eastern Corporation, which is publicly-owned. Panhandle Eastern Corporation has only one affiliate that has publicly-owned voting securities, TEPPCO Partners, LP.

Transcontinental Gas Pipe Line Corporation and Texas Gas Transmission Corporation are wholly-owned subsidiaries of Transco Energy Corporation, which is publicly-owned. One of the latter's affiliates, Transco Exploration Partners, Ltd., has publicly-owned voting securities.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, a group of interstate natural gas pipeline companies, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported as *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) ("*Columbia-II*"). (App. 1a-14a.) In an unreported order dated April 19, 1990, the court denied motions for rehearing and suggestions for rehearing *en banc* filed by the petitioner pipelines. (App. 15a.) On May 30, 1990, the D.C. Circuit stayed its mandate until June 22, 1990. (App. 16a.)

The agency orders that were before the D.C. Circuit in *Columbia II* are reported as *Transcontinental Gas Pipe Line Corp.*, 45 FERC ¶ 61,169 (1988), *reh'g and reconsideration denied*, 46 FERC ¶ 61,066 (1989), and

Panhandle Eastern Pipe Line Co., 44 FERC ¶ 61,173, *reh'g denied by operation of law*, 44 FERC ¶ 61,418 (1988). (App. 17a-41a.)

The previous case in this proceeding (known as *Columbia-I*), wherein the D.C. Circuit ordered a remand that led to the orders reviewed in *Columbia-II*, *is* reported as *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (1988). (App. 42a-59a.) The agency orders that were before the court in *Columbia-I* are reported as *Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230, *reh'g and clarification denied*, 33 FERC ¶ 61,213 (1985); *Texas Eastern Transmission Corp.*, 32 FERC ¶ 61,493, *reh'g denied*, 33 FERC ¶ 61,257 (1985); *Texas Gas Transmission Corp.*, 33 FERC ¶ 61,032, *reh'g denied*, 33 FERC ¶ 61,359 (1985); *Trunkline Gas Co.*, 33 FERC ¶ 61,217 (1985), *reh'g denied*, 34 FERC ¶ 61,021 (1986); *Panhandle Eastern Pipe Line Co.*, 33 FERC ¶ 61,218 (1985), *reh'g denied*, 34 FERC ¶ 61,231 (1986). (App. 60a-142a.)

JURISDICTION

The judgment sought to be reviewed was entered by the D.C. Circuit on February 9, 1990; the court's order denying motions for rehearing and suggestions for rehearing *en banc* was issued April 19, 1990. Jurisdiction in this Court to review the judgment below by writ of certiorari exists pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 4 and 5(a) of the Natural Gas Act of 1938, 15 U.S.C. §§ 717c and 717d(a); Sections 110(a) and 601(c)(2) of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3320(a) and 3431(c)(2), are reproduced in pertinent part at App. 143a-148a.

STATEMENT

The court below held that the Federal Energy Regulatory Commission ("Commission" or "FERC"), which is authorized by Congress (as was its predecessor, the Federal Power Commission [1]) to regulate sales and transportation of natural gas in interstate commerce, was powerless to effect an admittedly equitable distribution of certain costs associated with producing and gathering natural gas ultimately sold by interstate pipelines to their wholesale customers. The costs in question are substantial, totalling approximately $1.5 billion for the industry as a whole, and the Commission had undertaken a program to authorize their collection by producers, and recovery by interstate pipelines, in accordance with explicit provisions of the Natural Gas Policy Act of 1978. The restraint imposed upon the Commission by the court below frustrates the pipeline cost recovery portion of the Commission's program. During the period 1980-1983, the Commission, for administrative reasons, precluded producer-suppliers from including such costs in the price of gas sold to pipelines. While the Fifth Circuit in a related case held that the pipelines could be required to reimburse their upstream producer-suppliers for these costs for the preceding period, the District of Columbia Circuit in this case concluded that the Commission could not authorize the pipelines in turn to distribute the same costs proportionately among the downstream utilities to whom the gas was resold, purportedly because this constituted retroactive ratemaking.

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[1] The term "Commission" is used interchangeably herein to refer to the Federal Energy Regulatory Commission for the period beginning October 1, 1977, and to the Federal Power Commission prior to that date. *See Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 574 n.3 (1981).

A. Statutory and Regulatory Background

Although the Natural Gas Act ("NGA") was enacted in 1938, the Commission did not undertake to regulate wholesale sales of natural gas by independent producers until after this Court's decision in *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954), which held such sales to be within the Commission's jurisdiction. In response to widespread shortages during the 1970's, Congress enacted the Natural Gas Policy Act of 1978 ("NGPA"). "The NGPA is designed to preserve the Commission's authority under the NGA to regulate natural gas sales from pipelines to their customers; however, it is designed to supplant the Commission's authority to establish rates for the wholesale market, the market consisting of so-called 'first sales' of natural gas." *Public Service Comm'n of New York* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 331 (1983). *See also FERC* v. *Martin Exploration Management Co.*, 486 U.S. 204, 207-208 (1988). "Moreover, the statute replaces the Commission's authority to fix rates of return to gas producers according to what is 'just and reasonable' with a precise schedule of price ceilings." *Mid-Louisiana Gas Co.*, 463 U.S. at 334.

Section 110(a) of the NGPA provides in effect that certain costs incurred by producers and recouped in "first sales" need not be counted against the statutory price ceilings. These include, among other things, costs of compression and gathering that are "borne by the seller and allowed for, by rule or order, by the Commission." § 110(a)(2). In 1980, FERC issued its Order No. 94, 45 Fed. Reg. 53,099 (1980), a rulemaking order that among other things imposed a moratorium on the collection by producers of the costs attributable to compression and gathering of gas. A moratorium was necessary, the Commission concluded, because the appropriate allowance for these activities presented a complex question and the Commission needed time to develop a factual

basis upon which allowances could be authorized generically, a case-by-case approach being impractical under the circumstances. *Id.* at 53,107-53,108. Nevertheless, the Commission emphasized that it would institute a "retroactive collection procedure" once the generic rulemaking was complete. *Id.* at 53,107.[2]

Three years later, the Commission issued final rulemaking orders, Order No. 94-A, 48 Fed. Reg. 5152 (1983), and Order No. 94-B, 48 Fed. Reg. 5190 (1983), "containing its long-promised regulations addressing generic compression and gathering cost allowances." *Columbia-I*, App. 48a. True to its word, the Commission in those orders authorized retroactive collection by producers of the production-related costs that had been the subject of the three-year moratorium. Various pipelines and consumer representatives petitioned for judicial review of that aspect of the rules, among others, arguing that the Commission lacked authority to authorize retroactive collection of the new cost allowances by producers. In *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053, 1066 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986), the Fifth Circuit denied this contention, concluding that the Commission's approach "was a fair balancing of the various problems involved: the sellers' need for allowances, the purchasers' need for notice, and the Commission's need to make a thorough study prior to setting allowances."[3] (More recently, in *Phillips Pe-*

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[2] The pipelines, for their part, were prohibited under longstanding Commission regulations from attempting to recover costs before they were "known and measurable with reasonable accuracy." 18 C.F.R. § 154.63(e)(2).

[3] The Fifth Circuit in *Texas Eastern* also held that FERC had erred in not providing for collection by producers of certain additional production-related costs, and directed FERC to provide for such collection "to the same extent and retroactive to the same date" as other costs. 769 F.2d at 1065-1066. FERC did so in 1987, in Order No. 473, 52 Fed. Reg. 21,660, *aff'd in part and remanded in part sub nom. Phillips Petroleum Co.* v. *FERC*, No. 88-1257 (10th Cir. April 30, 1990).

troleum Co. v. *FERC*, No. 88-1257 (10th Cir. April 30, 1990), the Tenth Circuit, citing the Fifth Circuit's decision in *Texas Eastern*, likewise concluded that the Commission in Order No. 94 had given purchasers proper notice that retroactive allowances would be authorized for yet additional Section 110 costs.)

A final relevant provision of the statutory scheme is NGPA Section 601(c), entitled "Guaranteed Passthrough," which provides in pertinent part that "the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas," so long as the amounts paid are consistent with the statutory pricing requirements and the Commission's rules thereunder. These include the production-related costs covered by Section 110. Indeed, the only gas purchase costs incurred by pipelines that are *not* subject to this "guaranteed passthrough" are those found to be "excessive due to fraud, abuse, or similar grounds." § 601(c)(2); *see generally Office of Consumers' Counsel* v. *FERC*, 783 F.2d 206, 213-214 (D.C. Cir. 1986). No such allegations are present in this case.

B. The Pipelines' "Direct Billing" Proposals

As a consequence of the Commission rules affirmed by the 1985 *Texas Eastern* decision of the Fifth Circuit, the interstate pipelines were compelled to pay Section 110 production-related costs to their producer-suppliers retroactively for the 1980-1983 moratorium period. By 1985, however, the pipeline segment of the industry was in the process of a massive restructuring that was being fostered by the Commission in an effort to carry out its view of its statutory mandate under the Natural Gas Act and the NGPA. *See generally Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 994-997 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1468 (1988) (*"AGD-I"*). The basic thrust of this restructuring was to diminish the pipelines' longstanding role as sellers of gas and to increase their role as transporters of gas owned by

third-party shippers. Certain pipeline sales customers (including the respondents in this case), who were favorably situated, took advantage of the opportunities made possible by the Commission's initiatives and drastically reduced their purchases from the pipelines. As a result of these regulatory initiatives and related developments in gas markets, the customer base of the pipelines had changed to an unprecedented degree between the lifting of the Commission's moratorium in 1983 and the time of the Fifth Circuit's *Texas Eastern* decision in 1985. *See Transcontinental Gas Pipe Line Corp.* ("*Transco*"), Order on Remand, App. 23a.

To accommodate these changes, a number of pipelines proposed in separate filings before the Commission in 1985 to "direct bill" the production-related costs from the earlier moratorium period to their resale customers. Under these proposals, the pipelines would bill their customers for such costs on the basis of the ratio of each customer's purchases to the pipeline's total jurisdictional sales during the moratorium period. This approach, the pipelines pointed out, had two advantages over the alternative of simply including the moratorium costs in rates as a "current" gas expense. *See Transco*, Order Authorizing Direct Billing, App. 64a-65a. First, because the pipelines were experiencing dramatic, unprecedented changes in customer profiles, in particular a shift away from traditional sales to third-party transportation, billing the costs as a current gas expense would produce inequities; in particular, customers whose levels of purchases from the pipeline had declined would bear less than their proportionate share of the costs.[4] Second,

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[4] In some instances, certain pipeline customers were able to cease completely their purchases from their traditional pipeline suppliers, and instead to buy gas on the spot market and have it transported under third-party pipeline transportation arrangements. As the Commission recognized, if the NGPA Section 110 production-related costs arising during the 1980-1983 moratorium were passed through in 1985 or thereafter in current pipeline rates for gas sales, a cus-

the pipelines pointed out, their commodity charges for gas would be bloated by an influx of three years' worth of costs, thereby distorting natural gas sales markets, which at the time were already in disarray. *See generally AGD-I*, 824 F.2d at 995-996 (describing economic and regulatory developments in the interstate gas industry in the early 1980's).

The Commission accepted these proposals for direct billing. As the Commission said of the first such proposal, "[i]t is administratively effective, equitable, and meets our concern that pricing signals not be distorted by the influx of substantial retroactive Order No. 94-A costs." *Transco*, App. 66a. The Commission concluded that direct billing "will break the logjam that has existed and permit a relatively speedy passthrough of long overdue cost responsibility." *Id.* The Commission also rejected contentions that the direct billing mechanism constituted invalid retroactive ratemaking, citing, in one of its orders, the Fifth Circuit's denial of a similar claim in the *Texas Eastern* case. *Panhandle Eastern Pipe Line Co.*, App. 115a; *see also Transco*, Order Denying Rehearing, App. 128a-129a.

C. The D.C. Circuit's Decisions on Review of FERC's Orders

On judicial review, a panel of the D.C. Circuit concluded that the Commission's orders authorizing direct billing of Section 110 costs attributable to the 1980-1983 moratorium period was impermissible. As the court of appeals viewed it, "the effect of the orders is quite clear: downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase that we find to be prohibited by the NGA." *Columbia-I*, App. 51a. The

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tomer in this position would totally escape all responsibility for such costs.

court of appeals suggested that this problem would not be insurmountable, had the customers of the pipelines received "adequate notice" of their potential liability during the 1980-1983 moratorium. Although there was notice to the *pipelines* that they would be liable for these costs to their producer-suppliers, in the court's view, such notice was not adequate to alert the downstream customers who purchased gas supplies from the pipelines during that period. *Id.*[5]

In an order on rehearing, however, the court of appeals found that, "[i]n view of the magnitude of the costs at issue in this case," it would clarify, as requested by the parties, that the Commission was "free to consider" whether, notwithstanding the panel opinion, it should authorize the pipelines' direct billing proposals pursuant to its waiver authority under Section 4(d) of the Natural Gas Act. *Columbia-I*, App. 59a.

On remand, FERC again approved the direct billing proposals, this time on the basis of a waiver issued under Section 4(d). App. 17a-26a. There was "no question," the Commission found, that a waiver here was "in the public interest." App. 21a-22a. Absent a waiver, it was inevitable that "many of those customers who used the gas during the 1980 to 1983 period will not pay these compression and gathering costs. Instead, current cus-

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[5] The notice of potential retroactive liability for production-related costs provided by the Order 94 series, the court of appeals concluded, "was limited to a highly restricted audience" of producers and other "first sellers." App. 54a. Ironically, Columbia Gas Transmission Corporation, the lead petitioner in the court of appeals, although a downstream customer of the petitioner pipelines, also was a pipeline purchasing gas during the 1980-1983 moratorium period directly from producers. Thus, the court of appeals held, in effect, that although the notice in Order No. 94 may have been adequate to Columbia in its role as a *first* purchaser of Section 110 gas from producers, it was not adequate notice to Columbia with respect to its purchases from other pipelines.

tomers will pay these costs for those former customers." App. 23a. The Commission concluded:

> Equity and the public interest demand that these costs [estimated to run as high as $1.5 billion for all producers combined] be both recovered by the pipelines and fairly allocated by the pipelines to those who benefitted from the activities by which the costs were incurred. Accordingly, we conclude that the public interest is best served by granting the section 4(d) waiver.

Id. (footnote omitted).

In *Columbia-II*, the court of appeals again vacated and remanded the FERC orders.[6] The court found "no support" (App. 13a) for the Commission's statutory interpretation that on a finding of sufficient cause, it has the authority under Section 4(d) of the Natural Gas Act to grant waiver to allow recovery of the deferred costs at issue here, for good cause shown. The court acknowledged that "[t]he Commission may well be correct in its assessment of the equities here involved and of the distortion in market signals that may result from the allocation of $1.5 billion in prior production costs to current sales." App. 13a. Nevertheless, there was no flexibility under the statute, the court concluded, for the Commission "to mitigate the damage its errors of judgment or rulemaking delays may have caused." *Id.* Since the Commission, according to the court, had not

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[6] Also before the court in this consolidated proceeding were FERC's orders authorizing one pipeline to direct bill its customers for $17 million in Section 110 costs stemming from FERC's Order No. 473 production-related costs. *Panhandle Eastern Pipe Line Co.*, 44 FERC ¶ 61,173, *reh'g denied by operation of law*, 44 FERC ¶ 61,418 (1988). (App. 33a-39a.) Order No. 473 governs the deferred recovery of one category of Section 110 production-related costs. *Order No. 473, Compression Allowances and Protest Procedures Under Natural Gas Policy Act Section 110*, 52 Fed. Reg. 21,660 (1987), *reh'g granted in part, Order No. 473-A*, 53 Fed. Reg. 15 (1988), *aff'd in part and remanded in part sub nom. Phillips Petroleum Co. v. FERC*, No. 88-1257 (10th Cir. April 30, 1990).

given adequate notice at the beginning of the moratorium, "the Commission was without authority to impose a retroactive surcharge for whatever cause." *Id.*

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari in this case for three reasons. First, the case presents an important question of statutory construction concerning the scope of FERC's power to authorize, by means of its statutory waiver authority, a surcharge for the collection of those costs which the Commission had earlier ordered deferred until further order to permit their accurate determination. It does not, as the court of appeals' opinion may be read to imply, concern the "filed rate doctrine," recently addressed and reaffirmed by this Court in an Interstate Commerce Act case, *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, No. 89-624 (June 21, 1990), since no party here is seeking to enforce a rate not filed with, and accepted by, the Commission; on the contrary, these rates were so filed and accepted before the amounts at issue were collected. Second, the same restrictive and erroneous view of the Commission's powers adopted by the court of appeals in this case, and erroneously attributed to the filed rate doctrine, has been carried over and applied by that court in a series of other recent cases, thereby thwarting several major regulatory programs adopted by the Commission. Finally, there is a conflict in result between, on the one hand, the decision of the Fifth Circuit in the *Texas Eastern* case (as well as the Tenth Circuit's recent decision in *Phillips Petroleum*), which held that FERC did not err in authorizing producers to retroactively bill pipelines for NGPA Section 110 production-related costs incurred in 1980-1983 while the Commission-imposed moratorium was in effect, and, on the other hand, the decision below, which held that FERC was powerless to authorize the pipelines, in turn, to bill their customers for these same costs on the basis of the customers' actual purchases during the 1980-1983 moratorium period.

1. It is well-settled that the Commission's powers in approving the rates and conditions of service of interstate natural gas pipelines and other regulated entities are broad and flexible. As this Court has stated, "the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also id.* at 767. The Commission "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Id.* at 767. Towards this end, this Court has consistently rejected claims premised on a restrictive view of the Commission's discretion in rate cases. On the contrary, the Commission "is free 'to make the pragmatic adjustments which may be called for by particular circumstances.'" *Id.* at 800, *quoting FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). "Surely the Commission's broad responsibilities . . . demand a generous construction of its statutory authority." *Permian Basin*, 390 U.S. at 776 (citations and footnote omitted).

At issue here is the interplay between these precepts and the principle that, as this Court explained in *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578 (1981) ("*Arkla* v. *Hall*"), "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively." (Footnote omitted.) This rule against retroactive ratemaking, as it applies to natural gas pipelines, is attributed to the language and structure of Sections 4 and 5(a) of the Natural Gas Act.

Section 4 contains five subsections. First, and foremost, Section 4(a) provides that rates subject to federal jurisdiction under the Act must be "just and reasonable,"

and declares that any rates that are not just and reasonable are "unlawful." Second, Section 4(b) prohibits undue preferences or discrimination among customers. The third subsection, § 4(c), requires regulated companies to keep their rates on file with the Commission. The fourth subsection, § 4(d), is the source of the controversy in this case. It provides in relevant part:

> *Unless the Commission otherwise orders*, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and the public . . . . *The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for* by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

15 U.S.C. § 717c(d) (emphasis added). This provision "imposes a procedural requirement that is designed to protect the substantive policy interests reflected in the three preceding subsections." *Arkla* v. *Hall*, 453 U.S. at 595 (Stevens, J., dissenting). Finally, Section 4(e) provides the ground-rules for the filing of proposed rate changes by a regulated entity, including the Commission's power to "suspend" a rate increase so that it can be placed into effect "subject to refund."

Section 5(a) of the Gas Act, in turn, authorizes the Commission, upon a finding of unlawfulness, to "fix" a new rate to be "thereafter observed." This section prohibits the Commission from retroactively changing rates or ordering reparations. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).

Generally speaking, then, Section 4 requires the pipeline to charge only the rates on file and to provide notice to the Commission before changing rates, and Section 5(a) prohibits the Commission itself from retro-

actively changing a rate. However, this Court in *Arkla* v. *Hall* expressly left open the question whether, under Section 4(d), the Commission in appropriate circumstances might waive the statutory notice requirement. 453 U.S. at 578 n.8.[7]

In the instant case, the court of appeals purported to resolve this important statutory question in a manner that so severely constricts the Commission's discretion to grant waivers under Section 4(d) as to virtually read that power out of the statute. The court effectively stated that the statutory waiver is available to the Commission only to shorten the thirty-day notice period for rate change filings. App. 10a. Under the court of appeals' view, the Commission can *never* grant a waiver of the statutory notice period to authorize a supplemental charge for the recovery of deferred costs, as it did here—even if those amounts had been deferred by a valid Commission order. According to the court, the cases that appear to recognize such authority are all distinguishable, either on the ground that they involved pre-existing agreements by the parties to a retroactive rate (App. 12a), or, as in *Texas Eastern*, on the ground that the Commission itself gave "notice at the outset that the rates being promulgated [were] provisional only and subject to later revision." App. 13a.

This crabbed view of the Commission's waiver powers is wholly at odds with the language of Section 4(d), which requires "good cause," not agreement by the parties or advance notice by the Commission. It also is inconsistent with the Commission's broad ratemaking

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[7] Indeed, the producer-sellers in *Arkla* v. *Hall* ultimately did persuade a reviewing court to remand a Commission decision denying their request for waiver of Section 4(d). *Hall* v. *FERC*, 691 F.2d 1184, 1191-1192 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983). Moreover, prior to *Arkla* v. *Hall*, the D.C. Circuit itself had affirmed the Commission's grant of a waiver "for good cause shown" to permit newly filed rates to be given retroactive effect. *City of Piqua* v. *FERC*, 610 F.2d 950 (D.C. Cir. 1979).

powers as construed by this Court in *Permian Basin* and other cases.

Nor do the facts of this case raise an issue under the "filed rate doctrine," as the court of appeals' decision may be read to imply. As this Court recently explained in *Maislin Industries, supra,* slip op. 8-10, the filed rate doctrine prohibits both the regulated entity and its customers from enforcing any rate other than the filed rate. Here, in contrast, the issue is whether the Commission has the authority to approve a surcharge to recover deferred costs, the recovery of which is expressly authorized by statute. As noted above, these rates were all on file, and the collections were at the filed rate levels.

The error of the D.C. Circuit's approach is highlighted by its concession (App. 13a) that the Commission's assessment of the equities and the public interest in this instance appeared to be sound. Under the view advocated by the respondents here, and adopted by the court below, pipeline customers who purchased Section 110 gas during the 1980-1983 moratorium, but who fortuitously or designedly are purchasing lesser quantities of gas from their historic pipeline suppliers today, will escape their fair share of responsibility for these costs, which by now have been paid to producers by the pipelines. Thus, the court has stood the statutory ratemaking provisions on their head: instead of protecting the Commission's jurisdiction to determine whether rates meet the Act's standards, the court's interpretation of the statute accomplishes the perverse result of preventing the Commission from authorizing rates it has determined are needed to meet those standards.[8] In so doing, the

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[8] Ironically, moreover, the D.C. Circuit's decision does not advance either of the goals of the filed rate doctrine articulated by this Court in *Arkla* v. *Hall, viz.*, "preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." 453 U.S. at 577-578. Indeed, it hinders these objectives.

court of appeals has disregarded the plain teaching of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984), that courts should defer to a regulatory agency's interpretation of the organic statutes it administers.

There is, to be sure, some tension between the Commission's waiver power under Section 4(d) and the general requirement that both changes proposed by the pipelines under Section 4 and changes ordered by the Commission can only take effect prospectively. *See City of Girard* v. *FERC*, 790 F.2d 919, 924 (D.C. Cir. 1986) ("resolution of the conflict between the waiver power and the retroactive ratemaking rule presents difficult questions of statutory interpretation and regulatory policy").[9] The statute can and should be interpreted to give effect to both provisions. But the court of appeals clearly sweeps too broadly in holding that waiver may *never* be granted except in the limited circumstances where there is either agreement among the parties or advance notice by the Commission that a rate is subject to change.

Another panel of the court of appeals has already recognized one exception: where the Commission has unreasonably delayed the establishment of a prospective rate under Section 5(a). *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 578 n.5 (D.C. Cir. 1990), *reh'g en banc denied* (D.C. Cir. May 31, 1990). This reflects the long established rule that the Commission has ample power to "undo what is wrongfully done by virtue of its order." *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *accord: Office of Consumers' Counsel* v. *FERC*, 826 F.2d 1136 (D.C. Cir. 1987); *Tennessee Valley Municipal Gas Ass'n* v. *FPC*, 470 F.2d 446 (D.C. Cir. 1972). By the same token, when the Commission has affirmatively delayed

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[9] The court of appeals in *City of Girard* found it unnecessary to resolve the question, since it agreed with FERC that good cause justifying a waiver was not present on the facts of that case in any event. 790 F.2d at 924.

the establishment of new prospective rates by the pipelines because it is in the midst of formulating a major new regulatory initiative, as it was here, and the Commission's initiative by its nature cannot be brought to completion immediately, the Commission necessarily must possess the authority, by virtue of the discretion expressly granted in Section 4(d), to implement the program it ultimately finds just and reasonable, notwithstanding that the regulated utility itself could not do so by reason of the rule against retroactive ratemaking.

In short, the court of appeals is fundamentally wrong in its belief that FERC is powerless "to mitigate the damage its errors of judgment or rulemaking delays may have caused." App. 13a.

2. The importance of the question presented is demonstrated by the fact that this is but one of four recent cases in which the D.C. Circuit has, in effect, dismantled major regulatory initiatives of the Commission on the basis of the same restrictive view of the statute adopted by the court in this case. Taken together, these cases constitute a major intrusion by the court of appeals into the orderly administration by the Commission of a complex and important regulatory scheme, and in that sense run afoul of this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-544 (1978).

Two such cases—*Associated Gas Distributors* v. *FERC*, 893 F.2d 349, 354-357 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990) (mandate stayed) (*"AGD-II"*), and *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d at 576-581—invalidated, on the basis of the D.C. Circuit's novel view of the statute, Commission efforts to address outmoded pipeline-producer contracts in the wake of major Commission initiatives promoting third party transportation rather than traditional pipeline sales of gas. The Commission's transportation initiatives predictably left the pipelines stranded with billions of

dollars in "take-or-pay" liability to producer-suppliers under preexisting gas supply contracts. The Commission had failed to take any measures to address such contracts in the transportation rulemaking orders, which the D.C. Circuit in *AGD-I* (824 F.2d at 1021-1030) found to be a lapse in reasoned decisionmaking. Thus, the Commission's efforts to comply with the mandate of the court of appeals in *AGD-I* have been hamstrung and possibly sidetracked altogether because of the same rigid interpretation of the statute that permeates the court of appeals' reasoning in the instant case. Similarly, in *Public Utilities Comm'n of California* v. *FERC*, 894 F.2d 1372, 1382-1384 (D.C. Cir. 1990), the court of appeals found that the Commission's proposal to use amounts remaining in a pipeline's deferred tax account, following a change in the pricing of pipeline-produced gas under this Court's decision in *Mid-Louisiana Gas Co.*, *supra*, to reduce the pipeline's current rates constituted invalid retroactive ratemaking, since it would force the pipeline to return revenues collected under FERC-approved rates.

We emphasize, moreover, that the foregoing cases all arise at a time of profound changes in the interstate natural gas industry produced largely by the Commission's initiatives to carry out the policy of the recently enacted NGPA. As Chief Judge Wald stated in a dissent from the denial of rehearing *en banc* in the *Transwestern* case:

> I think the Court's current interpretation of the filed rate doctrine is overly rigid, at a time when the FERC needs latitude to navigate the recent dramatic changes in the structure of the natural gas industry. . . . It remains for the Supreme Court to settle this important question of how impenetrable a barrier the filed rate doctrine is to FERC's efforts at allocating the inevitable burdens stemming from fundamental readjustment of the pipeline industry.

Transwestern Pipeline Co. v. *FERC*, Nos. 88-1046, *et al.* (D.C. Cir. May 31, 1990) (order denying suggestions

for rehearing *en banc*) (separate statement of Chief Judge Wald). Thus, the court of appeals' unduly narrow view of the Commission's ratemaking powers only serves to undermine the overarching regulatory principle that costs should be borne by those on whose behalf they are incurred.

An additional consideration lending importance to the statutory question presented here is the fact that the ratemaking provisions of the Natural Gas Act are fundamentally similar to those of the Federal Power Act. *See Arkla* v. *Hall*, 453 U.S. at 577 n.7. Thus, it is all but certain that the D.C. Circuit's erroneous reasoning in this and the other gas cases discussed above, if not corrected by this Court, eventually will be carried over by the court to the electric power industry as well. It also may have implications for the Interstate Commerce Commission and other federal regulatory agencies that administer similar statutes.

3. Finally, the Court should grant certiorari because of the conflicting—and extremely inequitable—results created by the Fifth Circuit's decision in *Texas Eastern*, which affirmed the legality of the producers' retroactive recovery of production-related costs from pipelines, and the D.C. Circuit's decision here, which (by denying FERC the authority to grant waiver for good cause shown) prevented the pipelines from recovering those same costs from their downstream customers after being billed by their producer-suppliers.

In *Texas Eastern*, three of the petitioners herein, Panhandle Eastern Pipe Line Company, Trunkline Gas Company, and Transcontinental Gas Pipe Line Corporation, among others, sought review of several aspects of Order Nos. 94 and 94-A. The pipelines maintained "that the Commission should not have permitted any *retroactive* recovery of either allowances or interest." *Texas Eastern*, 769 F.2d at 1064 (emphasis added). However, the Fifth Circuit rejected the pipelines' argument and expressly approved the retroactive recovery that the Com-

mission authorized in the Order No. 94 series. *Id.* Indeed, the Fifth Circuit even required the Commission to permit additional charges, retroactively. 769 F.2d at 1065-1066.

Similarly, in the recent *Phillips Petroleum* case, the Tenth Circuit affirmed in part and remanded in part FERC's Order Nos. 473 and 473-A, which, like the Order No. 94 series, authorized retroactive collection by producers of certain production-related costs under NGPA Section 110. The Tenth Circuit, citing the *Texas Eastern* case, found that the Commission in Order No. 94 had given purchasers "proper notice" of the collection of retroactive allowances. *Phillips Petroleum*, slip op. 18.

The Commission consistently has maintained that in the Order No. 94 program it intended to give, and in good faith believed that it had given, adequate notice to the entire natural gas industry—producers, pipelines, both upstream and downstream, and the pipelines' jurisdictional customers—that recovery of production-related costs was only to be deferred, not denied. FERC could hardly have made it plainer that all rates charged for Section 110 gas during the Order No. 94 moratorium were, as the D.C. Circuit would put it in *Columbia-II*, "provisional only and subject to later revision." App. 13a. Yet, years later, and despite the Fifth Circuit's findings in *Texas Eastern*, the D.C. Circuit inexplicably concluded that the notice FERC had given in Order No. 94, although adequate as to the pipelines, somehow was inadequate as to the pipelines' customers, even though these customers cannot deny that under the most basic tenets of FERC ratemaking, the pipelines would be entitled, once the moratorium ended, to pass through to them the production-related costs paid to upstream suppliers for natural gas resold to the customers.[10] Indeed,

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[10] Thus, the D.C. Circuit's finding that pipeline customers had inadequate notice that they would one day be charged for production-related costs is implausible. As the Fifth Circuit remarked under similar circumstances, the courts should "greet[] such assertions,

such passthrough is expressly "guaranteed" by Section 601(c) of the NGPA, absent fraud, abuse, or similar findings, none of which is alleged here.

The result of the conflict between the decisions of the D.C. Circuit in this case and the Fifth and Tenth Circuits, respectively, in *Texas Eastern* and *Phillips Petroleum*, is to force the petitioner pipelines—who have already paid the money at issue to their producer-suppliers—to allocate production-related costs not among those customers whose purchases gave rise to the costs (because, under *Columbia-II*, that methodology is deemed irreconcilable with the filed rate doctrine), but rather among current or future customers without regard to whether those customers actually bought the natural gas subject to the Order No. 94 moratorium. Perhaps not surprisingly, two of the principal critics of direct billing in this case, Columbia Gas Transmission Corporation and Michigan Consolidated Gas Company, have largely shed their historical pipeline suppliers (from whom they did buy, at provisional rates, during the Order No. 94 moratorium), and to that extent would escape all responsibility for production-related costs, even though they cannot dispute that their purchases from their supplier pipelines caused those pipelines to incur a substantial portion of the production-related costs. In essence, *Columbia-II* leaves the pipelines without an effective, equitable means of recovering production-related costs.[11]

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made by highly sophisticated industry participants, with skepticism." *Shell Offshore, Inc.* v. *FERC*, 858 F.2d 1147, 1153 (5th Cir. 1988). This is particularly true as to Columbia Gas Transmission Corporation, one of the respondents, which was not only a downstream customer of several of the petitioner pipelines but also was itself a direct purchaser from producers and hence directly liable under the Order No. 94 program and the Fifth Circuit's *Texas Eastern* decision for its own retroactive Section 110 costs. *See* App. 25a n.25.

[11] In *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), this Court characterized as "trapped costs" those expenses

Chief Judge Wald, in *AGD-II*, described the similar dilemma of pipelines attempting to recover from their customers the costs of reforming outmoded take-or-pay contracts with their producer-suppliers:

> The panel's overly rigid interpretation of the filed rate doctrine to invalidate that Order leaves the FERC essentially powerless to take care of the take-or-pay crisis. The panel suggests that if pipelines wish to share their multi-billion dollar loss with consumers, they must do so by adding a surcharge to future sales. In a competitive market, of course, the "take-or-pay" pipelines will not be able to do this since such surcharges would raise their prices to an uncompetitive level. But even if some costs could be passed on to future consumers, that would still mean that total losses would be allocated inequitably. Those consumers who are in a position to take advantage of open-access shipping will bear proportionately less of the loss than those who cannot—even though the former (by switching to other pipelines) are the ones responsible for the loss.

AGD-II, 898 F.2d at 811 (Wald, C.J., dissenting from denial of rehearing *en banc*).

We submit that the same inequities are present here; indeed, the petitioners' dilemma in this case is even more compelling than in *ADG-II*, because here the inability to recover production-related costs results from the Com-

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allowed by the FERC and subsequently disallowed from recovery by a state regulator. Although this case does not present a question of federal preemption, it does raise the specter of "trapped costs" resulting from divergent appellate decisions: On the one hand, *Texas Eastern* and *Phillips Petroleum* authorized producer-suppliers to collect production-related costs on a deferred basis from the interstate pipelines, yet, on the other hand, *Columbia-II* forbids the pipelines precisely the same type of recovery mechanism. That *Columbia-II* achieves this anomalous result only emphasizes its erroneous view of the Commission's broad powers under the Natural Gas Act.

mission's own decision in Order No. 94 that recovery of such costs be deferred. The extraordinary inequity of this situation to the pipelines and their remaining sales customers, arising as it does from a conflict in result between the decision of the D.C. Circuit in this case, on the one hand, and the decisions of the Fifth and Tenth Circuits, on the other hand, warrants the granting of certiorari.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, the petitioners respectfully request that this Court grant certiorari to review the judgment of the U.S. Court of Appeals for the D.C. Circuit and hold that the Commission's orders authorizing the direct billing of NGPA Section 110 production-related costs should be affirmed.

Respectfully submitted,

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June 22, 1990